Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 235

FAIRMONT ALUMINUM COMPANY,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on May 18, 1955.

OPINIONS BELOW.

The opinion of the Tax Court is reported in 22 T. C. 1377 (reviewed by the entire Tax Court), and reprinted in the Record, Page 112. The opinion of the Court of Appeals, affirming the Tax Court, is as yet unreported, and is printed in the Appendix hereto, *infra*, pages 23 to 31. The judgment of affirmance is at page 31.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254.

Questions Presented.

1. Is the Tax Court of the United States (an independent agency in the Executive Branch of the Government) subject to the provisions of the *Administrative Procedure Act*?

2. If the first question above be answered negatively, is the Tax Court of the United States (an independent agency in the Executive Branch of the Government) subject to the supervisory powers of this Court?

3. Do the provisions of §272(g) of the 1939 *Internal Revenue Code* [26 U. S. C. §272(g)] preclude the application of inconsistent non-legislative concepts such as collateral estoppel?

4. Did the Court below correctly hold that the Tax Court was not required to correctly determine Petitioner's 1945 Excess Profits Tax Liability?

5. Did the Court below correctly hold that common law doctrines, such as collateral estoppel, are applicable to Federal statutory administrative proceedings?

6. Did the Court below correctly hold that the inability of Petitioner to produce evidence in a prior proceeding precludes the Petitioner from introducing such evidence in this proceeding?

7. Was the order of the Tax Court confirming Petitioner's tax liability, in the amount proposed by the

Respondent and without a consideration of the merits, contrary to law?

Statutes Involved.

The statutory provisions involved fall into two principal categories:

(1) The *Administrative Procedure Act* (60 Stat. 237) and the *Federal Register Act* (49 Stat. 501): both of these statutes are reprinted in the Appendix hereto, *infra,* pages 34 to 49; and

(2) The provisions of the 1939 *Internal Revenue Code.*[1] Sections 57 and 272(g) read as follows:

> "Sec. 57. Examination of Return and Determination of Tax.
>
> As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the *correct* amount of the tax."

> "Sec. 272(g) Jurisdiction Over Other Taxable Years.
>
> The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with

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[1] The 1939 *Internal Revenue Code* was superseded on August 16, 1954 by the 1954 *Internal Revenue Code.* By the provisions of §7851(b)(1) of the 1954 Code: "the repeal of any provision of the Internal Revenue Code of 1939 shall not affect any act done or any right accruing or accrued or any suit or proceeding had or commenced in any civil cause, before such repeal; but all rights and liabilities under such Code shall continue and may be enforced in the same manner, as if such repeal had not been made." The provisions of the 1939 *Internal Revenue Code* will be cited herein.

All statutes cited have substantially identical counterparts in the 1954 Code except §57 (1939 Code), which was omitted without any Committee comment indicating an intention to make a change. This omission of §57 may well be one of the "70 errors in the 1954 Internal Revenue Code". At this writing, the list has not been released from the Joint Committee.

> relation to the taxes for other taxable years as may be necessary *correctly* to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid." [Italics added]

Other relevant provisions of the 1939 *Internal Revenue Code* are reprinted in the Appendix hereto, *infra*, pages 49 to 54.

Statement.

April 18, 1952, Petitioner filed a petition (R. 6) in the Tax Court to review a proposed deficiency in Excess Profits Taxes for 1945 (R. 11). Respondent answered the petition (R. 15) and, by a subsequently filed amendment to the answer, set up an affirmative defense of collateral estoppel (R. 17), traversed by Petitioner's reply (R. 19).

The case came to trial July 7 and 8, 1953. Trial Judge Raum, *sua sponte*, suggested severance and trial of the issue of collateral estoppel (and another issue, abandoned by Respondent, and not now relevant) and the trial so proceeded (R. 26 *et seq.*).

In accordance with customary Tax Court practice, Petitioner submitted requests for findings and conclusions (R. 93) requesting, among other findings, that the Tax Court find that it "is an administrative agency" and subject to the *Administrative Procedure Act* (R. 95-96). The opinion of the Tax Court (R. 96), upon which the decision was subsequently entered (R. 112), sustained the defense of collateral estoppel. The Tax Court held that common law collateral estoppel applied and that the Tax Court was not subject to the *Administrative Procedure Act*. The Tax Court cited opinions of the Attorney General but did *not*

discuss (or even cite) the opinions of this Court which, we had contended, had supervened and were controlling (*Sung* v. *McGrath*, 339 U. S. 33; *Riss* v. *United States*, 341 U. S. 907; *Cates* v. *Haderlein*, 342 U. S. 804). On review by the Fourth Circuit, that Court affirmed without mention of the *Administrative Procedure Act* (Appendix herein, pp. 34 to 48).

The records and briefs in the prior case, upon which the defense of collateral estoppel was based were marked as exhibits in the instant case and have been transmitted to this Court with the Record. In the prior case, Petitioner was contesting a deficiency in 1944 Excess Profits Taxes (Tax Court Dkt. No. 13970, petition filed May 15, 1947). The basic issue in the prior case and in this one is whether a transaction by which Petitioner acquired substantially all the assets of a predecessor corporation constituted a tax-free reorganization, an issue long contested by Respondent and finally settled by decisions of this Court.[2] The earlier case was submitted on a stipulation of facts:

> 1. Whether the acquisition from Petitioner's predecessor was a tax-free reorganization under this Court's decisions. If it was *not*, Petitioner's principal contention could be disposed of. But if the transaction *was* a tax-free reorganization, *then and only then*, would it be necessary to recompute tax liability. For this, a further fact was material:
>
> 2. Petitioner's transferor's cost basis.

The Tax Court in the prior case looked to No. 2 before No. 1, held the proof as to cost basis insufficient, refused to consider the merits of the reorganization issue and

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[2] *Palm Springs Holding Corp.* v. *Commissioner*, 315 U. S. 185; *Helvering* v. *Alabama Asphaltic Limestone Co.*, 315 U. S. 179; *Helvering* v. *Cement Investors*, 316 U. S. 527; *Helvering* v. *Southwest Consolidated Corp.*, 315 U. S. 194.

directed a decision adverse to Petitioner on failure of proof (*Fairmont Aluminum Co.*, Dkt. 13970, 7 T. C. M. 783). On appeal, the Fourth Circuit affirmed *for failure of proof and not on the merits of the reorganization issue.* (*Fairmont Aluminum Co.* v. *Commissioner*, No. 5943, 180 F. 2d 832).

In the case now before this Court, Petitioner has secured the deposition of the bookkeeper who kept the books of Petitioner's predecessor, and other evidence not previously available, to supply the asserted deficiencies in the proof of the prior case (R. 53, *et seq.*).

Neither the Respondent's Brief in the Court below nor the opinion of that Court (Appendix herein, 23 to 31) cited the recent case of this Court, *United States* v. *International Building Co.*, 345 U. S. 502, which Petitioner relied upon for a correct statement of the application of the common law rule of collateral estoppel and contended that the affirmative defense should be overruled.

The Rules of Practice of the Tax Court were never republished in the *Federal Register*, following the adoption of the *Administrative Procedure Act*,[3] as were the rules of *all other administrative agencies* (see the "omnibus" issue of the *Federal Register* of September 11, 1946, 11 Fed. Reg. No. 177, *966* pages of administrative rules). Nor have

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[3] Administrative agencies, as defined in the *Administrative Procedure Act*, are substantially the same agencies defined in the earlier *Federal Register Act* (Appendix, pages 34-49). For the history which led to the adoption of the *Federal Register Act*, see *Lavery: "Hip Pocket Law"*, 7 F. R. D. 625, 635, discussing the then unreported incident that occurred before this Court on the argument of *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, and *United States* v. *Smith*, 293 U. S. 634. The Rules of Practice of the Tax Court have been regularly filed in the *Federal Register* pursuant to the *Federal Register Act*. Subsidiary to the first question hereinbefore propounded, is the question how the Tax Court can be an agency within the meaning of the *Federal Register Act* and be excluded from the parallel coverage of the *Administrative Procedure Act*.

amendments to its Rules, adopted subsequent to the *Administrative Procedure Act*, been adopted in accordance with the notice and hearing procedure of that Act. The Tax Court has never published a Rule on collateral estoppel.

Section 3(a) of the *Administrative Procedure Act* provides:

> "No person shall in any manner be required to resort to organization or procedure not so published."

Reasons for Granting the Writ.

1. The reasons for granting the writ will be set forth in separate subdivisions, A: The *Administrative Procedure Act* and the administrative nature of the agency of first instance below; B: The express Federal statutory provisions which are inconsistent with common law doctrine; C: The common law doctrine of collateral estoppel, assuming it survives *Erie R. Co.* v. *Tompkins*, 302 U. S. 671 and the later cases of this Court which have, at least so far, always expanded but never retreated from the rule of that case.

A.

2. Whether the independent agency in the Executive Branch of the Government, which was originally named the Board of Tax Appeals, now named the Tax Court of the United States, is subject to the provisions of the *Administrative Procedure Act*, is a question which has never been presented to this Court. The resolution of that question is of fundamental importance in the field of administrative law generally as well as in the many administrative procedures by which internal revenue tax liability is determined both preliminarily and finally. As early as

March 31, 1948, the Tax Court took an uncompromising stand that it was not subject to the *Administrative Procedure Act* and would not change its view unless this Court should determine differently. One of the many expressions of this view occurred during the trial of the case of *Edward A. Theurkauf*,[4] Docket No. 15749, at which the following appears at pages 5 and 6 of the trial minutes:

> "The Court: You understand, don't you, that the Tax Court has taken the view that it is not controlled by the Administrative Procedure Act and is following that view until the Supreme Court of the United States shall decide differently?"
>
> * * * * * *
>
> "The Court: We will be glad to have you argue it but undoubtedly the Tax Court will hold until the Supreme Court holds otherwise, that it is not affected by the Administrative Procedure Act. It does not foreclose argument, of course."

The issue was again raised in the instant case. The opinion of the Tax Court below (22 T. C. 1377, reviewed by the entire Tax Court) relies on obsolete opinions of the Attorney General which this Court considered and rejected on three separate occasions: *Sung* v. *McGrath*, 339 U. S. 33; *Riss* v. *United States*, 341 U. S. 907; *Cates* v. *Haderlein*, 342 U. S. 804. Since the last of these cases was reversed upon confession of error, this Court might have assumed that the Attorney General's former views as to implied exemptions from the Act had been effectively overruled by this Court and the question settled for all time. It is of deep significance that the opinions below do not cite any of these three cases although their appli-

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[4] 13 T. C. 529, Commissioner's appeal to the Second Circuit dismissed March 13, 1950, unreported.

cation was urged by the Petitioner. Since Petitioner's Briefs below have been certified to this Court, examination of them will dispel any doubt that the point was raised but rejected *sub silentio.*

3. The decision of the Court below is in direct conflict with the decision of the Sixth Circuit in *Lincoln Electric Co.* v. *Commissioner,* 162 F. 2d 397, which squarely held (correctly anticipating the broad scope later given to the *Administrative Procedure Act* by this Court in the cases cited above) that the Tax Court, despite its change of name, was still an administrative agency and not exempt from the broad scope of the Act. The Court said, at page 382:

> "The taxpayer, though insisting that we are not prevented from reviewing decision by the Dobson[5] rule, for the first time suggests that Dobson is no longer applicable in view of the recently enacted Administrative Procedures Act, 5 U. S. C. A. § 1001 et seq. To this the Commissioner replies that the Tax Court is not within the purview of the Act because it specifically excepts courts and applies only to agencies of the government. His reliance is upon a letter of the Attorney General to the Senate Judiciary Committee written, during the pendency of the bill, in response to an inquiry from its chairman.
>
> "The Board of Tax Appeals was, however, by the language of the statute creating it, 53 Stats. 158, 26 U. S. C. A. § 1100, 'an independent agency in the executive branch of the government.' It was so held in Old Colony Trust Co. *v.* Com'r, 279 U. S. 716, 49 S. Ct. 499, 73 L. Ed. 918. When by § 504(a) of the Revenue Act of 1942, its name was changed to the Tax Court of the United States, the Act expressly provided: 'the jurisdiction, powers, and duties of The Tax Court * * * shall be the same as by existing law

[5] *Dobson* v. *Commissioner,* 320 U. S. 489.

provided in the case of the Board of Tax Appeals.' § 504(b). When the Supreme Court came to consider, in Com'r *v.* Gooch Milling & Elevator Co., 320 U. S. 418, 64 S. Ct. 184, 88 L. Ed. 139, the jurisdiction of the Board of Tax Appeals to order a refund or credit a prior overpayment against a deficiency, it concluded that the Board possessed no power to grant equitable recoupment as did tribunals having general equity jurisdiction, for the Board (page 420 of 320 U. S., 64 S. Ct. 185, 88 L. Ed. 139) 'is but "an independent agency in the Executive Branch of the Government."' That case was decided in December, 1943, after the Board of Tax Appeals had become the Tax Court of the United States. See also Hutchings-Sealy Nat'l Bank *v.* Com'r, 5 Cir., 141 F. 2d 422. *While our conclusion is that review of Tax Court decisions is governed by the Administrative Procedures Act,* it does not become necessary, in view of our reliance upon the Bingham case, to particularize in what respect our power to review has been enlarged, except to say that *it doubtless has been broadened* and that it will be time enough to consider the precise application of the Act when clear-cut questions of fact or mixed questions of fact and law are brought to us for review." [Italics ours.]

The unwillingness of the Court below to refer to the *Administrative Procedure Act* and the *Lincoln Electric Co.* case, *supra,* is even more mystifying since the Fourth Circuit cited that case with approval in *Bahen & Wright* v. *Commissioner,* 176 F. 2d 538 at 539-540:

> "We think these several steps [issuance of deficiency letter, petition to Tax Court, etc.] may fairly be regarded as parts of an integral *administrative* proceeding, and that it cannot be said that the proceeding does not begin until the jurisdiction of the Tax Court is invoked. The [Tax] court merely takes the final *administrative* step as *'an independ-*

> *ent agency in the Executive Branch of the Government.'* [1939] *Internal Revenue Code* § 1100, 26 U. S. C. A. § 1100; *Goldsmith* v. *United States*, 270 U. S. 117; *Lincoln Electric Co.* v. *Commissioner*, 6th Cir., 162 F. 2d 379." [Italics and bracketed matter ours.]

It is submitted that the square conflict of the opinion below with the Sixth Circuit in *Lincoln Electric Co., supra,* and the conflict with its own prior decision in *Bahen & Wright* v. *Commissioner, supra,* warrants the granting of the writ herein sought to resolve this important question definitively.

4. The opinion below is also in direct conflict with the Court of Appeals for the District of Columbia on an important issue, ancillary to the previous question: whether the Tax Court is a judicial tribunal or an administrative agency. The Court below holds that the Tax Court is a judicial tribunal, and hence, applied common law rule of collateral estoppel heretofore reserved to truly judicial tribunals possessing common law jurisdiction.

A directly contrary holding appears in *Chairman of the United States Maritime Commission* v. *California Eastern Line, Inc.*, 204 F. 2d 398, where the Attorney General sought to apply the *judicial* rule of abatement (*Snyder* v. *Buck*, 340 U. S. 315). Rejecting the Government's argument, the Court said (at 401):

> "Throughout the proceedings, whether the matter is before the primary agency or before the Tax Court, the citizen is still seeking or resisting an executive determination; the matter is still in the bosom of the executive branch. In the words of the governing statute, the Tax Court is 'an independent agency in the Executive Branch of the Government', which 'shall be known as The Tax

> Court * * *.' 26 U. S. C. A. § 1100. It has been consistently held to be not a court, but 'an executive or administrative board.'" [Citing: *Old Colony Trust Co.* v. *Commissioner of Internal Revenue,* 1929, 279 U. S. 716, 725; *Rusk* v. *Commissioner of Internal Revenue,* 7 Cir., 1931, 53 F. 2d 428.]

The Government did not ask for certiorari in the last cited case but the case was subsequently reviewed in this Court on another point: the scope of *judicial review of administrative action. United States* v. *California Eastern Line, Inc.,* 348 U. S. 351. There, the Solicitor General cited and relied upon *Heikkila* v. *Barber,* 345 U. S. 229, (*a case construing the Administrative Procedure Act*) and *Davis: Unreviewable Administrative Action,* 15 F. R. D. 411. References to the *Administrative Procedure Act* in the briefs and argument were scrupulously avoided. Considerations, which may have prompted such omissions of reference to the *Administrative Procedure Act,* could, conceivably, include the knowledge of the pendency of this case. The instant case was argued in the Fourth Circuit on April 14, 1955, shortly after this Court's opinion in the *California Eastern Line* case was announced (March 7, 1955). However, the latter opinion was called to the attention of the Fourth Circuit on argument, copies of the opinion of this Court were handed up to the bench; the case could hardly have been overlooked. Further reason for grant of certiorari herein can then be stated upon the ground that it is very probably in conflict with applicable and governing decisions by this Court including *California Eastern Line, Inc.*

5. If the Tax Court is subject to the *Administrative Procedure Act,* then your Petitioner is entitled to relief by §3(a) of that Act:

"No person shall in any manner be required to resort to organization or procedure not so published."

Heikkila v. *Barber, supra.*

As this Court has pointed out just recently, the *Administrative Procedure Act* is to be given a "hospitable" interpretation. *Shaughnessy* v. *Podreiro,* No. 374, last Term, April 25, 1955 U. S. .

6. This Court held in *Dobson* v. *Commissioner, supra,* that the Tax Court was an administrative agency for the purposes of the [then] rule of administrative finality. In *Macauley* v. *Waterman S. S. Corp.,* 327 U. S. 540, this Court held that the Tax Court was an administrative agency for the purposes of the rule of exhaustion of *administrative* remedy before *judicial* intervention. Yet when former Chief Justice Vinson made his recommendation to the President on March 24, 1955, for a *Conference on Administrative Procedure,* the Tax Court was omitted from the call. The reasons given by the Justice Department (that the Tax Court is "like" the Customs Court and the Court of Customs and Patent Appeals) are set forth in two letters to counsel, reprinted in the Appendix herein, pages 32 to 34. Thus the confusion, resulting from the change of name from the Board of Tax Appeals to the Tax Court of the United States, predicted by former Attorney General Biddle[6], has arisen to cloud what has

[6] The three letters: to Senator George (July 24, 1942), to the Secretary of the Treasury (June 5, 1942) and to Congressman Doughton (July 3, 1942) are printed in *Hearings of the Senate Finance Committee on Revenue Act of 1942,* pages 2397-8 and are reproduced at pages 23 to 29 of Petitioner's brief to the Fourth Circuit, copies of which brief have been made available to this Court.

heretofore been crystal clear. On February 3, 1955, the *Report of the President's Conference on Administrative Procedure* was issued and thereafter published together with the President's letter of March 3, 1955, stating that *all* administrative agencies are to adopt modern procedural improvements. Is the President's directive applicable to the Tax Court? Whether or not the Tax Court is subject to the *Administrative Procedure Act,* this Court has jurisdiction to pass upon the question as incidental to its certiorari jurisdiction over administrative agencies (*Federal Communications Commission* v. *Allentown Broadcasting Corporation,* No. 451, last Term, June 6, 1955, U. S.). If the Tax Court has become a branch of the Judiciary, review is within the supervisory powers exercised by this Court. *Calvarese and Smaldone* v. *United States,* Nos. 538, 548, last Term, March 14, 1955, 348 U. S. 961.

7. This Court has announced the rule that common-law *res adjudicata* and its ancillary corollary, collateral estoppel, are not applicable to administrative proceedings. *Wallace Corporation* v. *N. L. R. B.,* 323 U. S. 248, 253; *N. L. R. B.* v. *Rockaway News Sales Co., Inc.,* 345 U. S. 71, 76. Recently, the Solicitor General said to this Court (his brief, page 12) that the rule was "well settled". *Jason* v. *Summerfield,* No. 219, last Term, October 14, 1954, 348 U. S. 840, certiorari denied, Justices Black and Douglas dissenting.

8. In *Rosenblum* v. *F. T. C.,* 2nd Cir., 214 F. 2d 338, the joint motion (to vacate a prior affirmance of a decree in a Federal Trade Commission proceeding, 192 F. 2d 392, cert. den. 343 U. S. 905) was granted *per curiam.* Judge Clark's vigorous dissent, referring to *other quasi-judicial agencies* said (214 F. 2d at 339):

> "The basis upon which the Commission took its present action of vacating its own order of December 19, 1950, and dismissing its original complaint in its entirety, as well as asking us to do likewise, is that it has changed its position with respect to the use, in advertising, of the word 'free.' And it refers us to another case not a part of this record. *In re Walter J. Black, Inc.*, FTC, Docket 5571, Sept. 11, 1953, wherein the use of the word 'free' was held permissible when the conditions for receipt of the 'free' article were at the same time explained fully or in effect to the Commission's satisfaction. This change in policy seems rather clearly due to a change in personnel of the Commission; see the dissent herein and in the *Black* case of Commissioner and former Chairman Mead. And this appears to be the view of business. A like metamorphosis appears to be taking place with respect to *other 'quasi-judicial' agencies,* and other cases of this nature are clearly indicated. This involves *a development of administrative law perhaps too little appreciated by writers and experts in the field;* it demonstrates how the impact of a regulatory law upon the regulated business can be completely changed or removed with no change whatsoever in the fundamental law or statute." [Italics ours.]

This Court decided *Dobson* v. *Commissioner, supra, Macauley* v. *Waterman S. S. Corp., supra,* and *United States* v. *California Eastern Line, Inc., supra,* by classifying the Tax Court as like *any other administrative agency.* The Court below, we submit, has departed from decisions of this Court which due deference required it to follow.

Thus, the decision below conflicts in principle with such cases as *United States* v. *Frantz,* 3rd Cir., Nos. 11,331 and 11,341, 220 F. 2d 123 (cert. den., June 6, 1955, No. 767 last Term, U. S.), where the Government's brief, page 36, stated the correct rule:

> "The term 'court' as used by plaintiff [*United States*] here, does not refer to The Tax Court of the United States. *The Tax Court is not a 'court' but an administrative body in the Executive Branch of the Federal Government.* See, *Old Colony Trust Company, et al.* v. *Commissioner of Internal Revenue* (1929) 279 U. S. 716; Act of October 21, 1942, § 504, 56 Stat. 957." [Italics and bracketed matter ours.]

B.

9. If the cases of *Wallace Corporation* and *Rockaway News Supply, supra,* are grounded on statutory interpretation rather than a decisional rule, then a like result is required by the express terms of §272(g) of the 1939 Code (set forth *supra,* pages 3-4).

We understand that Respondent's views require this Court to interpolate into the statute:

> "provided *such facts* were not previously a matter of inquiry and determination in another proceeding affecting another taxable year."

The obvious answer is:

> "Such a reading requires more than a tailoring of the Act; it requires a full alteration. * * * If the rule * * * is to be altered in the manner suggested, the amending process is available for that purpose." [*Snyder* v. *Buck,* 340 U. S. 15, 20.]

In *62 Cases of Jam* v. *United States,* 340 U. S. 593 at 596, this Court said:

> "But our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor subtract, neither to delete nor to distort."

And more recently in *Unexcelled Chemical Corporation* v. *United States,* 345 U. S. 59 at 64, this Court said:

> "It is not for us then to try to avoid the conclusion that Congress did not mean what it said. Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved. But when Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final—save for questions of constitutional power which have not even been intimated here."

See also:

Central Bank v. *United States,* 345 U. S. 639.

10. On the above analysis, the decision of the Court below is in direct conflict with *Lyons* v. *Westinghouse Elect. Corp.,* 2nd Cir., 222 F. 2d 184, now pending on certiorari before this Court as *Walsh* v. *Lyons,* No. 98, this Term, originally filed as No. 818, last Term. The Second Circuit holds that the statutory mandate assuring a Federal forum for the trial of an anti-trust case supervenes a state court adjudication (holding that the claim is baseless) from predetermining a trial in the Federal forum which might, perhaps, reach a contrary result. That case presents an interesting parallel of the principle that due deference for statutory mandate must be held to supervene prior conceptions of the non-statutory doctrine of *res adjudicata* (the instant case involves collateral estoppel). In No. 98, the Second Circuit has correctly obeyed the mandate of Federal law even to the extent of superseding a prior state court adjudication between the same parties.[7]

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[7] The brief of the respondent in No. 98 (at pages 1-2) suggests that the state court adjudication there was not "final". There is authority for a contrary view. In *Cohen and Karger, Powers of*

The Court below has previously reached the same result, but contrary to the result herein. In *Pelham G. Wodehouse,* 8 T. C. 637, the Tax Court decided a case involving two tax years. Because the returns involved were filed with Collectors in Baltimore and New York, respectively, the appeals went to different circuits. In *Wodehouse* v. *Commissioner,* 178 F. 2d 987, the Fourth Circuit *affirming* 8 T. C. 637, reached a result contrary to a prior adjudication by the Second Circuit involving the *identical* point of the *same taxpayer,* but another tax year, *Wodehouse* v. *Commissioner* (2nd Cir., 177 F. 2d 881, *reversing* 8 T. C. 637). The cases were briefed and argued in *both* circuits *before* the first decision was handed down by the Second Circuit on November 2, 1949, 177 F. 2d 881. On December 21, 1949, the Fourth Circuit disagreed with the Second Circuit and said so, 178 F. 2d 987. We submit that the attempt to reconcile that case with the instant case merely shows how tenuous is a taxpayer's case when he attempts to avoid a *correct* determination of his tax liability. Similar attempt was made to distinguish the result, contrary to the opinion below, reached by the Third Circuit in the application of *res adjudicata.*

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the New York Court of Appeals, Revised Edition (1952), Section 21, Page 85:

> "The determination which finally adjudicates any • • • counterclaim is final for purposes of appeal, and it does not matter whether or not a severance is ordered."

Citing *New York Trap Rock Corporation* v. *Town of Clarkstown,* 299 N. Y. 77, 80 (1949) where a unanimous Court of Appeals said:

> "The counterclaim is in effect a separate and distinct action brought by defendants against plaintiff. Judgment of the Appellate Division dismissing it, impliedly severed it from the action, which still is pending undetermined, and to that extent is final."

The rule in this Court is the same. *Carondelet Canal Co.* v. *Louisiana,* 233 U. S. 362, cited by the authors at page 73.

In *Erie Forge Company*, 4 T. C. M. 1127, the Commissioner sought to impose delinquency penalties. The issue was decided adversely to him and the Third Circuit affirmed, 167 F. 2d 71. The Respondent authorized the commencement of an action by the Attorney General against Erie Forge Company *for the very same penalty* and it was brought in the District Court, *United States* v. *Erie Forge Company*. Thinking as Judge Raum did in the opinion below, the district judge dismissed, 93 F. Supp. 192. Now the Third Circuit, notwithstanding its prior affirmance of *Commissioner* v. *Erie Forge Company, supra*, agreed with the Attorney-General *on the ground that the statute prevailed over conventional thoughts of common law res adjudicata*, and permitted a recovery, 191 F. 2d 627! Erie Forge Company applied for certiorari from this very remarkable result. By the strenuous protestations of the Solicitor General, *as a matter of statutory interpretation*, he succeeded in having the petition denied, 343 U. S. 930. It will not do to say, as the Court below said, that the Tax Court did not "exercise jurisdiction" of the issue by denying the Respondent's motion to reopen without opinion. The Tax Court followed the same practice in the prior *Fairmont Aluminum* case as both opinions of the Court below plainly indicated.

There is no statutory authority for the doctrine of collateral estoppel. There is no principle by which this Court could judicially legislate such a rule, and this Court should so hold.

We think that the rule here contended for was clearly foreshadowed by this Court's decision in *Commissioner* v. *Sunnen*, 333 U. S. 591, where this Court refused to apply collateral estoppel on the ground that there was no statutory authority for it, and moreover, it would lead to inequality among taxpayers. The Court below so con-

strued the *Sunnen* case in *Stanback* v. *Robertson* (4th Cir.), 183 F. 2d 889, cert. den., 340 U. S. 904. This would be consistent with proper deference to the statutory mandate but admittedly a departure from common law doctrine.

Perhaps the first step in this direction was taken in 1938 when this Court decided *Helvering* v. *Mitchell*, 303 U. S. 391, *preceding* the decision in *Erie R. Co.* v. *Tompkins*, *supra*, 304 U. S. 64. That "general equitable considerations" are inapplicable in taxation (*Deputy* v. *DuPont*, 308 U. S. 488, 493) has just recently been restated in *United States* v. *Olympic Radio & Television, Inc.*, No. 10, last Term, May 23, 1955, ... U. S. ..... The rules of statutory construction are "as applicable to the Government as to the taxpayer." *Lewyt Corp.* v. *Commissioner*, No. 417, last Term, May 23, 1955 ..... U. S. .....; to the same effect: *Lilly* v. *Commissioner*, 343 U. S. 90.

C.

11. The Court below did not cite the most recent case of this Court dealing with the application of collateral estoppel in a case properly governed by common law principles: a *common law cause of action* to which the United States has consented to be sued (in lieu of a *common law action* against the Collector). At least the Court below was unwilling to approve the Tax Court's application of *United States* v. *International Building Co.*, 345 U. S. 502. This Court said (page 506):

> "But unless we can say that they are an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: It would become a device by which a decision not shown to

be on the merits would foreclose inquiry into the merits."

"Inquiry into the merits" has been here foreclosed.

12. But the rule of *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, relied upon below, is a common law rule, not applicable to Federal statutory judicial proceedings (see page 17, *supra*) and *squarely held to be inapplicable to Federal statutory administrative proceedings by prior decisions of this Court* (see pages 14-15, *supra*). As this Court pointed out in *Wilburn Boat Co.* v. *Firemen's Fund Insurance Co.*, No. 7, last Term, 348 U. S. 310, decisions prior to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, grounded on the erroneous notion of a Federal common law are no longer governing authority. The error of Respondent in construing *Commissioner* v. *Sunnen, supra,* as authority for the result below, is strikingly similar to the contention made by the Government in the argument in *Commissioner* v. *Culbertson*, 337 U. S. 733: that this Court, in *Commissioner* v. *Tower*, 327 U. S. 280, and *Lusthaus* v. *Commissioner*, 327 U. S. 293, rewrote the general law of partnerships (337 U. S. at 738). This Court went to some length to correct both the error of the petitioner in that case, and of the error of the Tax Court upon which the argument was predicated (337 U. S. at 743 and 750).

If there is no Federal common law in Federal statutory judicial proceedings, there can be no Federal common law applicable to Federal statutory quasi-judicial administrative proceedings.

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

July 11, 1955.

Respectfully submitted,

EARL Q. KULLMAN,
Attorney for Petitioner,
120 Broadway,
New York 5, N. Y.

Appendix.

UNITED STATES COURT OF APPEALS,

FOR THE FOURTH CIRCUIT.

No. 6946

FAIRMONT ALUMINUM COMPANY,

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

(Argued April 14, 1955. Decided May 18, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

EARL Q. KULLMAN (KIRLIN, CAMPBELL & KEATING on brief) for Petitioner, and MELVA M. GRANEY, Special Assistant to the Attorney General, (H. BRIAN HOLLAND, Assistant Attorney General, and ELLIS N. SLACK, Special Assistant to the Attorney General, on brief) for Respondent.

PARKER, Chief Judge:

This is an appeal from the Tax Court of the United States involving a deficiency in excess profits taxes for the

year 1945. The question in the case is based upon the contention of taxpayer that its equity invested capital was not less than $1,500,000 instead of $550,000, the amount allowed. Precisely the same question was raised by taxpayer before the Tax Court with respect to the computation of its excess profits taxes for the year 1944, and was decided adversely to its contention both by the Tax Court and by this court. *Fairmont Aluminum Co.* v. *Commissioner,* 4 Cir. 180 F. 2d 832. The court below held taxpayer concluded by the decision in the prior litigation on the principle of collateral estoppel. Taxpayer argues that the principle of collateral estoppel has no application (1) because it contends that the prior decision was not one on the merits, (2) because it says that there has been a change of "legal atmosphere" and (3) because it says the Tax Court is not a court at all but an administrative agency. We think that there is no merit in any of these contentions.

There can be no question but that the prior decision was a decision on the merits. In 1926 taxpayer had acquired property formerly belonging to the West Virginia Metal Products Corporation. That property had been sold under foreclosure proceedings and purchased by a committee of bondholders, who transferred it to taxpayer for notes in the aggregate sum of $550,000 and 3,000 of the 60,000 shares of common stock. Taxpayer contended that the property so acquired was worth $1,500,000 but offered nothing in support of the contention except a 1923 balance sheet. With respect to that matter this court said:

> "Manifestly a corporate balance sheet more than two years old has no tendency to establish the value of property after it has been foreclosed and held for more than two years thereafter. From the stipulated facts that the negotiations between the bondholders committee and the Adam group were conducted at arm's length, and that only 5% of the common stock was issued to the bondholders with $550,000 of notes, whereas 95% went to the preferred stockholders who put up $200,000, it is a fair inference that the com-

mon stock was considered to have little or no value and that the $550,000 was considered the fair value of the property transferred."

We considered also the contention of taxpayer that its claim should be allowed on the ground that it came into being as a tax free reorganization under the holding in *Palm Springs Holding Corporation* v. *Commissioner* 315 U. S. 185 and held that it had not established its claim on this basis, saying:

"Taxpayer contends that it came into being as the result of a tax free reorganization of the West Virginia Metal Products Corporation, relying for this position principally upon the decision in the case of *Palm Springs Holding Corporation* v. *Commissioner* 315 U. S. 185, 62 S. Ct. 544, 86 L. Ed. 785; but even if this were true, it would not benefit taxpayer. The balance sheet offered furnishes no basis for computing equity invested capital in connection with that reorganization or otherwise; and, in addition to this, there is no evidence to take the case out of the ordinary rule that upon a reorganization where one corporation is organized to take over the assets of another, the new corporation takes only the value of the assets transferred (less the transferor's debts) as its equity invested capital. Where the old corporation has a deficit, this may be included in the equity invested capital of the new under 718(a)(7), but only if the conditions of 718(c)(5) are met, viz., if all the property of the old corporation is transferred to the new, if the sole consideration of the transfer of the property is the transfer to the transferor or its shareholders of all stock of all classes of the transferee, and if the transferor corporation is forthwith completely liquidated and immediately after the liquidation the shareholders of the transferor own all such stock. Even if the bondholders of the West Virginia Metal Products Corporation

be treated as stockholders, under the doctrine of the Palm Springs case, it is obvious that these conditions have not been met. This being true, it is not necessary to consider whether the reorganization falls within the rule of the Palm Springs case."

In the prior case taxpayer relied upon a stipulation of facts, notwithstanding a warning by government counsel that it was insufficient to establish either of the contentions made by taxpayer. When the Tax Court decided that case against taxpayer on the ground that there had been a failure of proof, taxpayer asked to reopen the case for the taking of additional testimony, but this was denied. A subsequent motion for a new trial was likewise denied. On appeal this court had before it all the proceedings had in the Tax Court including these motions and affirmed the judgment there rendered. There can be no question but that the judgment so rendered was a judgment on the merits and was binding upon the taxpayer, on the principle of collateral estoppel on the issues raised as to its equity invested capital. A judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form. *Swift* v. *McPherson* 232 U. S. 51; *Clegg* v. *United States* 10 Cir. 112 F. 2d 886; 30 Am. Jur. p 994; 49 C. J. S. 33; 27 Words and Phrases, Permanent Edition p. 146-147. Certainly a judgment on an agreed statement of facts is a judgment on the merits, just as is a judgment on the pleadings. See 27 Words & Phrases 146 and cases there cited. And it does not become anything other than a judgment on the merits because a party fails to include in the agreed statement facts necessary to support his contentions. When taxpayer has invoked the judgment of the court with respect to his claim, he is bound by an adverse judgment, whether this has resulted from the fact that the law is against him, from failure to produce sufficient proof or from failure to include sufficient facts in a stipulation.

It is well settled that, although a judgment rendered with respect to taxes for one year is not *res judicata* in a

suit for taxes for another year, a decision as to a matter put in issue and decided in the former suit is binding on the principle of estoppel by judgment or collateral estoppel with respect to the same matter arising in the subsequent litigation, provided that, in the meantime, there has been no change in the fact situation or in the law applicable thereto. *Commissioner* v. *Sunnen* 333 U. S. 591, 601. As said by the Supreme Court in the case cited:

> "Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or nonliability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceedings involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit. Collateral estoppel operates, in other words, to relieve the government and the taxpayer of 'redundant litigation of the identical question of the statute's application to the taxpayer's status.' " *Tait* v. *Western Md. R. Co.,* 289 U. S. 620, 624.
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> * * * * * *
>
> "If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation. See *Travelers Ins. Co.* v. *Commissioner,* 161 F. 2d 93. And where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive. * * *
>
> "Of course, where a question of fact essential to the judgment is actually litigated and and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different. See *The Evergreens* v. *Nunan,* 141 F. 2d 927. And if the very same facts and no others are involved in

> the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change."

There has been no change of fact, of law or of "legal atmosphere" affecting taxpayer's equity invested capital, since the decision in the prior case with regard to that matter. The questions of fact essential to the judgment in that case are the same questions of fact which are involved here; and the case cannot be distinguished in principle from *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, cited with approval in the *Sunnen* case, *supra*. In the *Tait* case this court had held that, where bonds of a railroad had been sold at a discount, it was proper, for income tax purposes, that such discount be amortized over the life of the bonds and a proportionate part thereof be deducted each year as accrued interest from gross income. A deduction was allowed for the tax years 1918 and 1919. *Western Maryland R. Co.* v. *Commissioner*, 4 Cir. 33 F. 2d 695. In subsequent litigation relating to tax liability for the years 1920-1925, the same question was raised and it was held that the parties were bound by the determination thereof in the prior litigation. *Western Maryland R. Co.* v. *Tait*, 53 F. 2d 211, aff. 4 Cir. 62 F. 2d 933, aff. by Supreme Court, 289 U. S. 620. In that case the question of the deductibility of bond discount was the same for the several years, just as here the questions relating to equity invested capital are the same. In holding that the decision in the former case operated as an estoppel, the Supreme Court said:

> "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. *Cromwell* v. *County of Sac.*, 94 U. S. 351, 352-353;

Southern Pacific R. Co. v. *United States,* 168 U. S. 1, 48; *United States* v. *Moser,* 266 U. S. 236, 241. • • •

"This court has repeatedly applied the doctrine of res judicata in actions concerning state taxes, holding the parties concluded in a suit for one year's tax as to the right or question adjudicated by a former judgment respecting the tax of an earlier year. *New Orleans* v. *Citizens' Bank,* 167 U. S. 371; *Third National Bank* v. *Stone,* 174 U. S. 432; *Baldwin* v. *Maryland,* 179 U. S. 220; *Deposit Bank* v. *Frankfort,* 191 U. S. 499. Compare *United States* v. *Stone & Downer Co.,* 274 U. S. 225, 230-231. The public policy upon which the rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens."

Taxpayer contends that changes in procedural law and in the legal atmosphere brings the case within the exceptions noted in *Commissioner* v. *Sunnen, supra;* but this contention is so lacking in merit as not to warrant discussion. There has been no change in the law relating to equity invested capital for the years in question and no change in procedural law or the law of evidence which would enable taxpayer to produce evidence that he could not have produced at that time. Taxpayer had all the evidence when our prior decision was rendered as to equity invested capital that it has now; and there has been no change in the facts. Taxpayer is merely attempting to have tried over again the question as to the amount of equity invested capital arising out of the taking over the assets of the West Virginia Metal Products Corporation, the very matter which we passed upon and determined in the prior litigation. Taxpayer cites the cases of *Wodehouse* v. *Com'r* reported in 177 F. 2d 881 and 178 F. 2d 987; but in neither of these decisions is collateral estoppel relied on or discussed. Another case relied on is *United States* v. *Erie Forge Company,* 3 Cir. 191 F. 2d 627, which is manifestly not in point, holding merely that there was no estoppel where the court had never assumed jurisdiction of the matter in dispute in the prior case.

The taxpayer contends also that the doctrine of collateral estoppel, or estoppel by judgment, may not be applied to proceedings of the Tax Court, which, it contends, is not a court at all but an administrative agency. It is perfectly clear, however, that whether the Tax Court be regarded as a court or as an administrative agency, it is exercising judicial functions in hearing tax cases of this character; and, when, exercising judicial functions, as distinguished from administrative functions,* it is bound to apply such fundamental judicial doctrines as *res judicata* and estoppel. The case of *Commissioner* v. *Sunnen, supra,* in which the Supreme Court was at pains to point out the distinction between *res judicata* and collateral estoppel with the limitations upon the latter which were applied in that case, was a case which originated in the Tax Court; and all of the law there laid down by the Supreme Court would have been beside the point if *res judicata* and collateral estoppel had no application to Tax Court cases. In the course of the opinions in that case, the court used the following language heretofore quoted, viz., "Of course, where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different. See *The Evergreens* v. *Nunan,* 141 F. 2d 927. And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change." The case of the *The Evergreens* v. *Nunan,* 141 F. 2d 927, cert. den. 323 U. S. 720, cited by the Supreme Court, is a decision of the Court of Appeals of the Second Circuit, reviewing a decision of the Tax Court, wherein Judge Learned Hand had stated the principle of equitable

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* That *res judicata* and estoppel do not apply to administrative action, see *Houghton* v. *Payne,* 195 U. S. 88; *Federal Communication Com'n* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 145; *N. L. R. B.* v. *Baltimore Trust Co.,* 4 Cir. 140 F. 2d 51, 55; *Wallace Corp.* v. *N. L. R. B.,* 4 Cir. 141 F. 2d 87, 91.

estoppel or estoppel by judgment as applicable to a Tax Court proceeding. Directly in point in holding the doctrine of collateral estoppel applicable to Tax Court proceedings are the recent cases of *Lynch* v. *Com'r*, 7 Cir. 216 F. 2d 574 and *Lunsford* v. *Com'r*, 5 Cir. 212 F. 2d 878. And see the cases cited in note 13 of the opinion of the Tax Court in which that court has heretofore applied the doctrine of collateral estoppel.

AFFIRMED.

Judgment.

[SAME TITLE.]

ON PETITION to Review the Decision of the Tax Court of the United States.

THIS CAUSE came on to be heard on the transcript of the record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the said The Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

ARMISTEAD M. DOBIE,
United States Circuit Judge.

FILED
MAY 18, 1955
R. M. F. WILLIAMS, JR.
CLERK

COPY

THE WHITE HOUSE

WASHINGTON

June 17, 1953.

Dear Mr. Kullman:

I have been in touch with the Department of Justice relative to your letter of May 22nd suggesting that the Tax Court of the United States should be included among the agencies to participate in the Conference on Administrative Procedure called by the President.

It is the feeling of the Department of Justice that although the Tax Court is not classified as a court, nor as an administrative agency, nevertheless its functions and procedures resemble those of a court rather than an administrative agency, and for this reason they were not included.

For the same practical reason the Customs Court and the Court of Customs and Patent Appeals were likewise not designated to participate. I do hope you will understand the underlying reasons for this decision.

Yours sincerely,

s/ B. M. SHANLEY
BERNARD M. SHANLEY
Special Counsel to the President

MR. EARL Q. KULLMAN
KIRLIN, CAMPBELL & KEATING
120 Broadway
New York 5, N. Y.

COPY

Assistant Attorney General

DEPARTMENT OF JUSTICE

WASHINGTON

July 24, 1953

Mr. EARL Q. KULLMAN
KIRLIN, CAMPBELL & KEATING
120 Broadway
New York 5, N. Y.

Dear Mr. Kullman:

Your letters of June 22 and July 3, 1953, addressed to Mr. Bernard M. Shanley, Special Counsel to the President, have been referred to me for reply.

In these letters, together with your letter of May 22, 1953, addressed to Mr. Thomas E. Stephens, you have expressed the view that the Tax Court of the United States is an administrative agency in the executive branch of the government, rather than a court, and that it was therefore incumbent upon the Attorney General to designate the Tax Court as one of the administrative agencies to participate in the President's Conference on Administrative Procedure.

As Mr. Shanley advised you in his letter of June 17, 1953, the Tax Court was not designated to participate in the Conference because it was felt that as a practical matter the Tax Court's procedures resemble the procedures of courts rather than those of typical administrative agencies. Thus, the sole function of the Tax Court is to determine tax disputes between the Government and taxpayers. Like courts, and unlike many administrative agencies, the Tax Court performs no investigatory functions nor can it initiate proceedings before it. While courts and administrative agencies obviously have some procedural problems

in common, I believe that the functions and procedures of the Tax Court differ sufficiently from those of the Federal Communications Commission, for example, as to justify the omission of the Tax Court from the list of agencies participating in the Conference.

In any event, the omission of the Tax Court reflected only a general practical judgment and did not purport to be a determination as to the status of the Tax Court as a court or administrative agency in each of the many contexts in which that question can arise. Indeed, it seems unlikely that the participation or non-participation of the Tax Court in the President's Conference could be dispositive of its precise legal status for other and more specific purposes.

Sincerely yours,

(s) J. LEE RANKIN
J. LEE RANKIN
Assistant Attorney General,
Office of Legal Counsel.

Administrative Procedure Act (60 Stat. 237).

SECTION 1. This Act may be cited as the "Administrative Procedure Act".

DEFINITIONS

SEC. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives

of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes*: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

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* Listed in 5 U. S. C. A. 1001 as "and the functions conferred by sections 301-303, 304, 305, 306-309, 310, 311-318, 1881-1884 and 1891-1902 of Appendix to Title 50, and sections 1738 and 1744 of Title 12; sections 1611-1614, 1615-1646, and 981-985, of Appendix to Title 50, and sections 101-125 of Title 41; and sections 1738, 1739, and 1743 of Title 12, and sections 1821-1838 of Appendix to Title 50."

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) SANCTION AND RELIEF.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirements, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsection (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the

public interest or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) OPINIONS AND ORDERS.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) PUBLIC RECORDS.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

RULE MAKING

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) PETITION.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION.

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become

unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

ANCILLARY MATTERS

SEC. 6. Except as otherwise provided in this Act—

(a) APPEARANCE.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation,

adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

(b) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) SUBPENAS.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(d) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice

shall be accompanied by a simple statement of procedural or other grounds.

HEARINGS

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of

proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial

decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Sanctions and Powers

Sec. 9. In the exercise of any power or authority—

(a) In general.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

(b) Licenses.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

Judicial Review

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all

relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

EXAMINERS.

SEC. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of

section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

CONSTRUCTION AND EFFECT.

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Approved June 11, 1946.

Federal Register Act.

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"§304. *Definitions.*

As used in this chapter, unless the context otherwise requires, the term 'document' means any Presidential proclamation or Executive order and any order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by a Federal agency; the terms 'Federal agency' or 'agency' mean the President of the United States, or any executive department, independent board, establishment, bureau, agency institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government; and the term 'person' means any individual, partnership, association, or corporation. (July 26, 1935, c. 417, §4, 49 Stat. 501.)"

1939 Internal Revenue Code.

SEC. 57. EXAMINATION OF RETURN AND DETERMINATION OF TAX.

As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax.

SEC. 1100. STATUS.

The Board of Tax Appeals (hereinafter referred to as the "Board") shall be continued as an independent agency in the Executive Branch of the Government. *The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the chief judge and the judges of The Tax Court of the United States.* [*Italics:* 1942 Amendment]

SEC. 1116. HEARINGS.

Notice and opportunity to be heard upon any proceeding instituted before the Board shall be given to the tax-

payer and the Commissioner. If an opportunity to be heard upon the proceeding is given before a division of the Board, neither the taxpayer nor the Commissioner shall be entitled to notice and opportunity to be heard before the Board upon review, except upon a specific order of the chairman. Hearings before the Board and its division shall be open to the public, and the testimony, and, if the Board so requires, the argument shall be stenographically reported. The Board is authorized to contract (by renewal of contract or otherwise) for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies.

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

(a) PETITION FOR REVIEW NOT FILED ON TIME.—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(b) DECISION AFFIRMED OR PETITION FOR REVIEW DISMISSED.—

(1) PETITION FOR CERTIORARI NOT FILED ON TIME.—Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(2) PETITION FOR CERTIORARI DENIED.—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) AFTER MANDATE OF SUPREME COURT.—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(c) DECISION MODIFIED OR REVERSED.—

(1) UPON MANDATE OF SUPREME COURT.—If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(2) UPON MANDATE OF THE CIRCUIT COURT OF APPEALS.—If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) REHEARING.—If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall become final in the same manner as though no prior decision of the Board had been rendered.

(e) DEFINITIONS.—As used in this section—

(1) CIRCUIT COURT OF APPEALS.—The term "Circuit Court of Appeals" includes the United States Court of Appeals for the District of Columbia;

(2) MANDATE.—The term "mandate," in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate.

SEC. 1141. COURTS OF REVIEW.

(a) JURISDICTION.—The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in Section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 1254 of Title 28 of the United States Code.

(b) VENUE.—

(1) IN GENERAL.—Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

(2) BY AGREEMENT.—Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing.

(3) APPLICATION OF SUBSECTION.—This subsection shall be applicable to all decisions of the Board rendered on and after May 10, 1934, and section 1002 of the Revenue

Act of 1926, 44 Stat. 110, as in force prior to May 10, 1934, shall be applicable to such decisions rendered prior thereto, except that paragraph 2 of this subsection may be applied to any such decision rendered prior to May 10, 1934.

(c) POWERS.—

(1) TO AFFIRM, MODIFY, OR REVERSE.—Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

(2) TO MAKE RULES.—Such courts are authorized to adopt rules for the filing of the petition for review, the preparation of the record for review, and the conduct of proceedings upon such review.

(3) TO REQUIRE ADDITIONAL SECURITY.—Nothing in section 1145 shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review.

(4) TO IMPOSE DAMAGES.—The Circuit Court of Appeals, the United States Court of Appeals for the District of Columbia, and the Supreme Court shall have power to impose damages in any case where the decision of the Board is affirmed and it appears that the petition was filed merely for delay.

SEC. 1142. PETITION FOR REVIEW.

The decision of the Board rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Board prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the deci-

sion is rendered or, in the case of a decision on or before June 6, 1932, within six months after the decision is rendered.

Revenue Act of 1942.

SEC. 504. CHANGE OF NAME OF BOARD OF TAX APPEALS.

(a) *The Tax Court of the United States.*—Effective on the day after the date of enactment of this Act, section 1100 (relating to status of Board of Tax Appeals) is amended by inserting at the end thereof the following new sentence: "The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of The Tax Court of the United States."

(b) *Powers, Tenure, Etc., Unchanged.*—The jurisdiction, powers, and duties of The Tax Court of the United States, its divisions and its officers, and employees, and their appointment, including the designation of its officers, and the immunities, tenure of office, powers, duties, rights and privileges of the presiding judge and judges of The Tax Court of the United States shall be the same as by existing law provided in the case of the Board of Tax Appeals. The Commissioner shall continue to be represented by the same counsel in the same manner before the Court as he has heretofore been represented in proceedings before the Board of Tax Appeals and the taxpayer shall continue to be represented in accordance with rules of practice prescribed by the Court. No qualified person shall be denied admission to practice before such Court because of his failure to be a member of any profession or calling.

(c) *References.* All references in any statute (except this section), or in any rule, regulation or order, to the "Board of Tax Appeals" or to the "Board" when used in the sense of "Board of Tax Appeals", or to the "member", "members", or "chairman" thereof shall be considered to be made to The Tax Court of the United States, the judge, judges, and presiding judge thereof, respectively.

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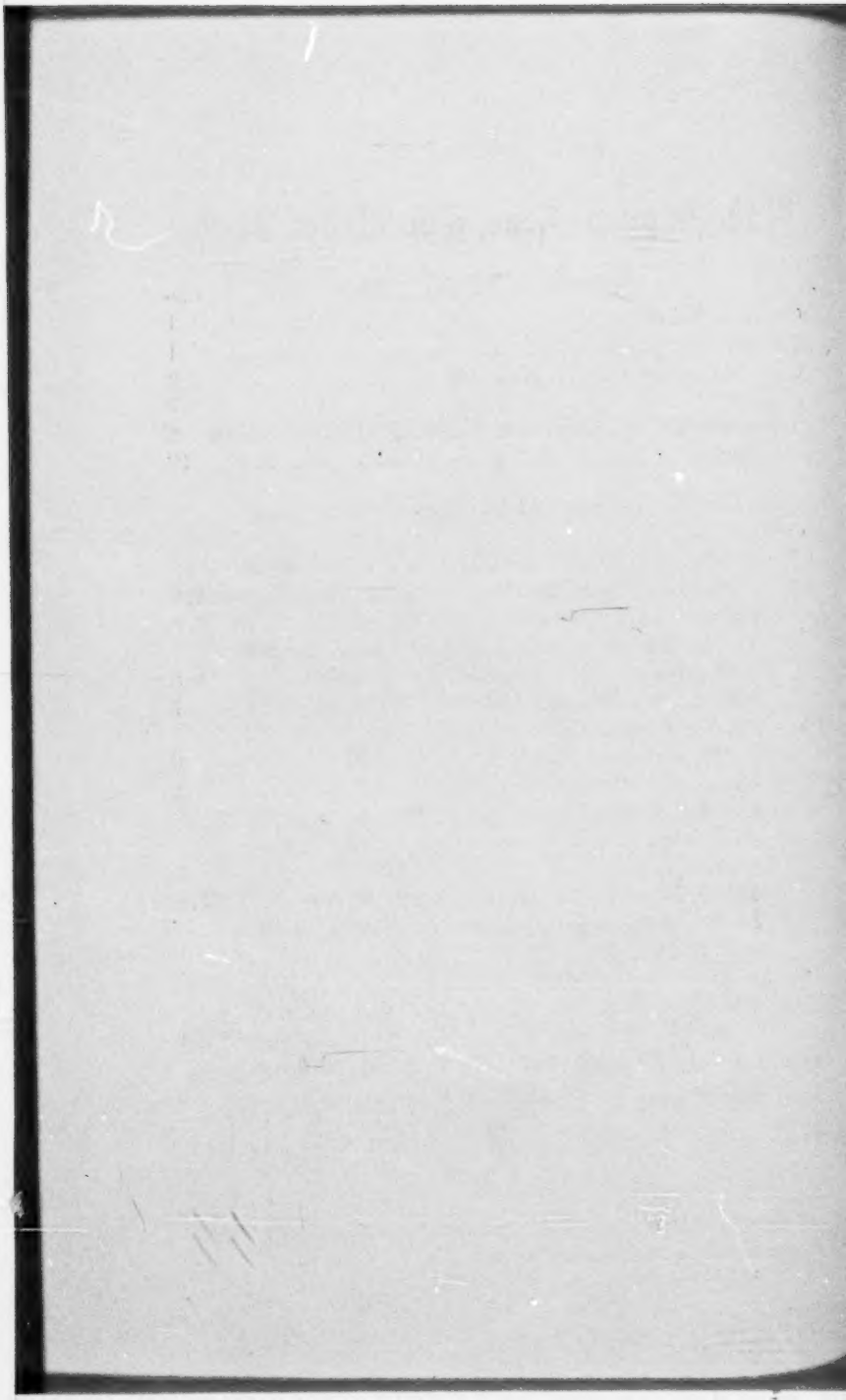

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 235

FAIRMONT ALUMINUM COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 96–109)[1] are reported at 22 T. C. 1377. The opinion of the Court of Appeals (Pet. 23–31) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1955. (Pet. 31.) The petition for a writ of certiorari was filed on July 14, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

[1] Record references are to the taxpayer's separately bound Appendix filed in the court below.

QUESTION PRESENTED

Whether the doctrine of collateral estoppel precluded relitigation in the Tax Court for the year 1945 of a question as to the correct amount of taxpayer's equity invested capital, where that question had been decided adversely to the taxpayer by both the Tax Court and the Court of Appeals in an earlier litigation concerning the year 1944.

STATEMENT

In its petition for review by the Tax Court (R. 6–10) taxpayer sought to contest the Commissioner's determination of an excess profits tax deficiency in the amount of $85,019.82 and an overpayment of income tax in the amount of $38,991.36, or a net deficiency of $46,028.46, for the calendar year 1945 (R. 96). The Commissioner, by an amendment to his answer (R. 17–19), raised the defense of collateral estoppel on the ground that the same issues had been litigated and decided against taxpayer in an earlier proceeding involving the years 1942 through 1944. At the Tax Court hearing the collateral estoppel issue was severed (R. 43–46, 48–49) and the trial proceeded on that one issue. The Tax Court held that collateral estoppel precluded relitigation of the questions decided in the prior action, requiring decision here against the taxpayer (R. 100–109), and the Court of Appeals affirmed (Pet. 23–31).

The Tax Court's findings of fact (R. 96–100) may be summarized as follows:[2]

Taxpayer was incorporated as a West Virginia corporation on September 27, 1926, and acquired the assets of West Virginia Metal Products Corporation (hereinafter called Metal Products) from the first mortgage bondholders of that corporation after foreclosure of their mortgage. (R. 96–98.) In the present proceeding, where taxpayer is seeking to contest the Commissioner's deficiency determination for the year 1945, the determination was based on the ground that taxpayer is not entitled to any equity invested capital under Section 718 (a) (2) of the Internal Revenue Code of 1939 in connection with the acquisition of the Metal Products assets. Similarly, in a prior proceeding (Tax Court Docket No. 13970), where taxpayer contested the Commissioner's deficiency determination for the years 1942–1944, the Commissioner's deficiency determination was based in part on the same ground. In the present case, as in the prior proceeding, the petition for review filed by taxpayer in the Tax Court was based on alternative allegations as to taxpayer's basis for the Metal Products assets for invested capital and depreciation purposes—(1) that taxpayer, as Metal Products' successor in a

[2] The Tax Court's findings incorporate by reference the entire record in the earlier proceeding, both in the Tax Court and in the Court of Appeals, including all pleadings, testimony, evidence, briefs, and papers filed therein. (R. 100.)

reorganization, was entitled to use Metal Products' basis for the assets, alleged to be $2,529,774.33, or (2) that taxpayer's basis was the fair market value of the assets, alleged to be $1,500,000 or more. (R. 97–99.)

In the prior case taxpayer relied solely upon a stipulation of facts notwithstanding that taxpayer's counsel was warned by Government counsel that the stipulated material, in the Government's view, was insufficient to establish the amount of either of the alternative bases alleged by taxpayer. The Tax Court concluded that the stipulated facts were insufficient to prove either Metal Products' basis for the assets or the fair market value of the assets, and therefore found it unnecessary to decide whether taxpayer had inherited Metal Products' basis through the alleged reorganization. *Fairmont Aluminum Co.* v. *Commissioner*, decided October 25, 1948 (1948 P–H T. C. Memorandum Decisions, par. 48,221). Taxpayer subsequently filed certain motions in the Tax Court, including a motion for leave to file a motion for a new trial on the ground of newly discovered evidence. That motion was accompanied by the proposed motion for a new trial, which had annexed to it the alleged newly discovered evidence. The motions were all denied. An appeal was taken to the Fourth Circuit, which had before it the motions taxpayer had filed in the Tax Court subsequent to the rendition of the Tax

Court's opinion. The Court of Appeals affirmed the decision of the Tax Court, holding (1) that the Tax Court was correct in its conclusion that there had been a failure of proof, and (2) that, regarding the taxpayer's claim that it was entitled to use Metal Products' basis, there was no evidence to take the case out of the ordinary rule that upon a reorganization, where one corporation is organized to take over the assets of another, the new corporation takes only the value of the assets transferred (less the transferor's debts) as its equity invested capital. 180 F. 2d 832.

In the present proceeding, evidence claimed by taxpayer's counsel not to have been available for the prior proceeding was offered and admitted for the limited purpose of showing the scope of the proof that might be offered in a trial on the merits. (See, *e. g.*, R. 53–58.) The Tax Court found as a fact (R. 100) that this evidence could have been obtained prior to the trial in the earlier proceeding if due diligence had been used.

ARGUMENT

This case presents a classic situation for the application of the doctrine of collateral estoppel as that doctrine was explained by this Court, with particular reference to tax cases, in *Commissioner* v. *Sunnen,* 333 U. S. 591. As the Tax Court and Court of Appeals both held, in this proceeding taxpayer is seeking to relitigate for 1945 the identical issue it previously litigated for 1944

(R. 101; Pet. 24, 29); the decision in the prior proceeding was a decision on the merits (R. 102–103; Pet. 24–26); and there has been no change in the law to make the doctrine of collateral estoppel inapplicable (R. 103–105; Pet. 26–29). All of the numerous assertions made by taxpayer as reasons for granting the writ (Pet. 7–21) have reference solely to the question whether the nature of the forum for these repetitive proceedings, the Tax Court, precludes application of the doctrine. Contrary to taxpayer's assertions, the decision below in this connection is not in conflict with other decisions and raises no serious question.

Taxpayer asserts (Pet. 7–16) that the decision below conflicts with decisions holding the Tax Court to be an administrative agency (*Chairman of U. S. Maritime Com'n* v. *California East. L.*, 204 F. 2d 398 (C. A. D. C.)) subject to the provisions for judicial review in the Administrative Procedure Act, c. 324, 60 Stat. 237 (*Lincoln Electric Co.* v. *Commissioner*, 162 F. 2d 379 (C. A. 6th), certiorari denied, 338 U. S. 949), and that the question whether the Tax Court "is subject to the provisions of the Administrative Procedure Act" is an important one (Pet. 7). However, the scope of this Act is not in fact involved here. The suggestion that it is and the broad assertions of conflict in the petition are based upon the erroneous assumption that the court below held the Tax Court to be a "court"

in some sweeping and universal sense, as distinguished from an administrative agency.[3] What the court below actually held, however, was simply that (Pet. 30)—

> whether the Tax Court be regarded as a court or as an administrative agency, it is exercising judicial functions in hearing tax cases of this character; and when, exercising judicial functions, as distinguished from administrative functions, it is bound to apply such fundamental judicial doctrines as *res judicata* and estoppel.

The decisions cited by taxpayer, none of which involved the problem of collateral estoppel in Tax Court litigation, contain no remote suggestion of conflict with this obviously sound proposition.

On the contrary, the conclusion that collateral estoppel applies to Tax Court decisions has long been accepted both by this Court and the lower courts. In *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, a tax case which arose in a District Court, collateral estoppel was applied on the basis

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[3] The Tax Court has been held to be an administrative agency (see, *e. g.*, *Chairman of U. S. Maritime Com'n* v. *California East. L.*, *supra*), but, because of the judicial functions it exercises in tax cases, has also been treated as a court for some purposes (see, *e. g.*, *Kay* v. *Commissioner*, 178 F. 2d 772, 773 (C. A. 3d); *Stern* v. *Commissioner*, 215 F. 2d 701, 707–708 (C. A. 3d); *Reo Motors, Inc.* v. *Commissioner*, 219 F. 2d 610, 612 (C. A. 6th)). It seems unnecessary to labor the point that specific problems like the one here cannot be solved by a once-for-all assignment of one label or the other.

of a prior decision of the Tax Court on the same issue. In *Commissioner* v. *Sunnen,* 333 U. S. 591, where, as here, both the first and second proceedings arose in the Tax Court, this Court explained the doctrine of *res judicata* and its adjunct, collateral estoppel, as applied to tax cases, and held collateral estoppel inapplicable only because of a change in the law bearing on the issue presented.[4] As the court below stated (Pet. 30), all of the law laid down in *Sunnen* "would have been beside the point if *res judicata* and collateral estoppel had no application to Tax Court cases." In addition to the decisive examples of *Sunnen* and *Tait* v. *Western Md. Ry.,* to which may be added the more recent decision in *United States* v. *International Building Co.,* 345 U. S. 502, collateral estoppel has been applied in innumerable Tax Court cases on the basis of a prior decision of the Tax Court, and in many other cases the doctrine was deemed available but not applied because of the circumstances of the particular case. See the recent decision in *Lynch* v. *Commissioner,* 216 F. 2d 574 (C. A. 7th), and the

[4] Ignoring the actual holding in *Sunnen* and the Court's statement in that case that the doctrine of *res judicata* is "judicial in origin" (p. 597), taxpayer asserts that in *Sunnen* "this Court refused to apply collateral estoppel on the ground that there was no statutory authority for it" (Pet. 19). *Tait* v. *Western Md. Ry. Co., supra,* is dismissed by taxpayer with the unexplained statement that the rule of that case "is a common law rule, not applicable to Federal statutory judicial proceedings." (Pet. 21.)

Tax Court's citation of cases taken at random (R. 108–109); cf. *Lunsford* v. *Commissioner*, 212 F. 2d 878 (C. A. 5th). The applicability of the doctrine to Tax Court proceedings has been considered so well established that, as in *Sunnen*, it has not even been questioned in these numerous cases.

The soundness of this settled view is clear despite the taxpayer's novel suggestion (Pet. 16) that Section 272 (g) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 272) constitutes a statutory mandate against the application of the doctrine of collateral estoppel to Tax Court decisions. That section merely provides that, in redetermining a deficiency for any taxable year, the Tax Court shall consider such facts with relation to the taxes for other taxable years as may be necessary to redetermine correctly the amount of the deficiency but in so doing shall not have jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid. Obviously, the section was not designed to have any relation to collateral estoppel, the application of which entails no determination for any year other than the one properly before the Tax Court in any given case.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1955.

No. 235.

FAIRMONT ALUMINUM COMPANY,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

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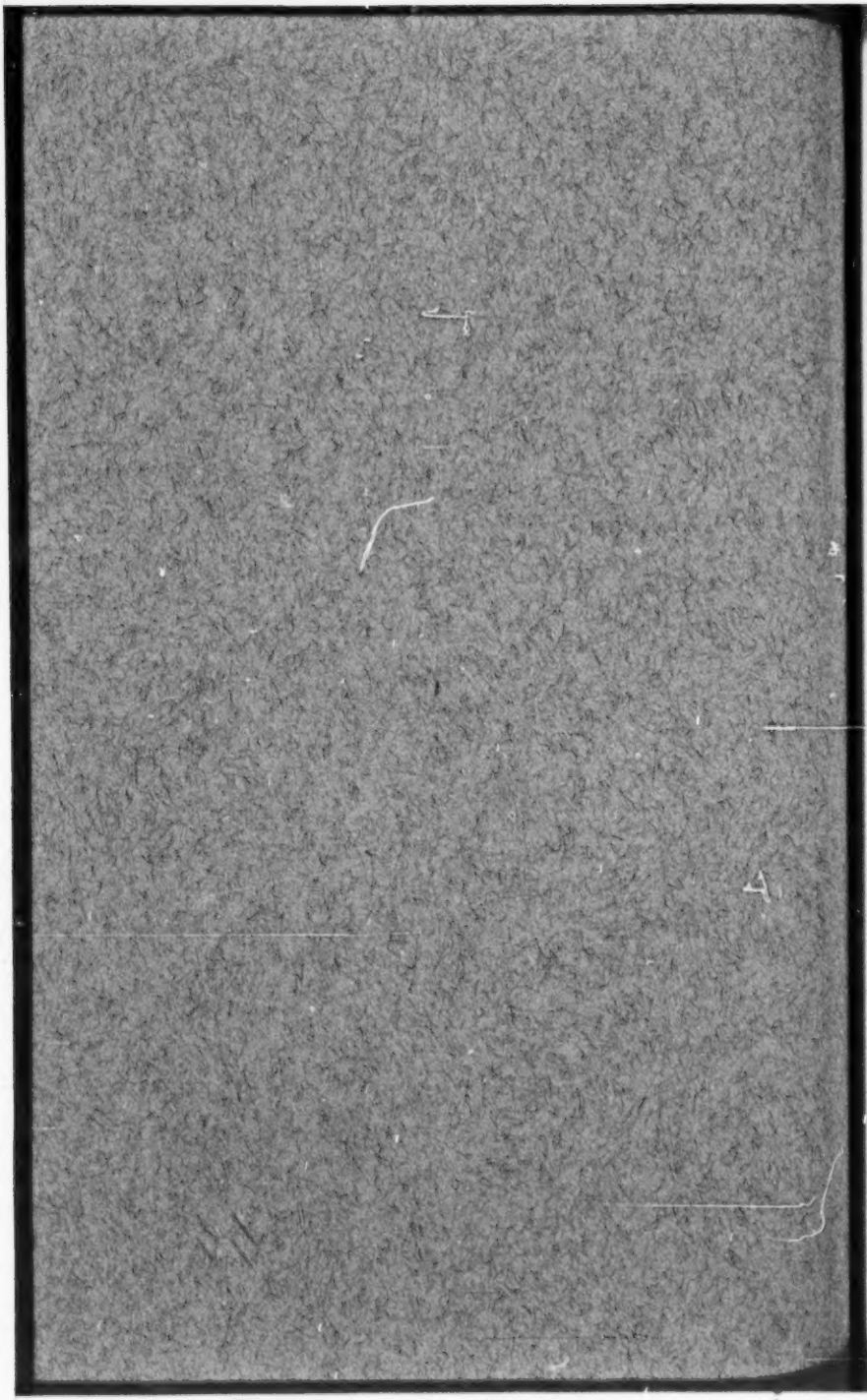

Supreme Court of the United States

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No. 235.

FAIRMONT ALUMINUM COMPANY,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

Petitioner prays that this Court grant a rehearing of its order of October 10, 1955 denying certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit in the above-captioned case, as prayed for in the petition filed July 14, 1955 herein.

JURISDICTION.

The Petition for Certiorari (p. 2), heretofore filed, invoked jurisdiction under 28 U. S. C. §1254. The question of jurisdiction is not contested by the brief for the Respondent filed in opposition to the petition herein (p. 1 of Respondent's Brief).

Reasons for Granting a Rehearing.

This case presents questions, basic to the administration of the Internal Revenue Laws: whether and to what extent, a determination of a prior year's tax liability is conclusive to preclude the *correct* determination of another year's tax liability. By common law doctrinaire, the rule is labelled "collateral estoppel." The brief of the Respondent fails to deny (hence, we submit, implicitly admits) that the decisions in the Courts below are in conflict.

If a prior year's determination of tax liability can ever preclude the statutory standard of the *correct* determination of any year's tax liability, the Respondent, in suggesting that this Court should deny certiorari, has relied principally on *Commissioner* v. *Sunnen*, 333 U. S. 591.

The Fourth Circuit below gives that case an interpretation sufficiently broad to justify a refusal to comply with a statutory mandate. The Fifth Circuit has just recently reached a directly contrary result (I, below). The Chancellor of the State of Delaware, subsequent to the filing of this petition, suggests other, and perhaps more compelling reasons for any avoidance of a statutory mandate (II, below).

I.

Subsequent to the filing of the petition herein, the Fifth Circuit has decided the identical issue of collateral estoppel, principally raised by the petition herein, contrary to the decision of the Fourth Circuit below. See: *Harley Alexander and Maude Alexander* v. *Commissioner*, Fifth Circuit, No. 15,307, decided August 2, 1955, and just recently officially reported, 224 F. 2d 788 (Advance Sheet of Octo-

ber 3, 1955). The direct conflict can be best indicated by a parallel comparison:

FAIRMONT	ALEXANDER
The prior *Fairmont* case was tried on the merits. 7 T. C. M. 783	The prior *Alexander* case was tried on the merits. 9 T. C. M. 356
The prior decision was in favor of the Commissioner on the ground of failure of proof. 7 T. C. M. at 786-9	The prior decision was in favor of the Commissioner on the ground of failure of proof. 9 T. C. M. at 360-7
The Fourth Circuit affirmed the prior *Fairmont* case. 180 F. 2d 832	The Fifth Circuit affirmed the prior *Alexander* case. 194 F. 2d 921
The Tax Court held that the second *Fairmont* case was governed by the prior decision *although admittedly the evidence was different.* 22 T. C. 1377	The Tax Court held that the second *Alexander* case was governed by the prior decision *although admittedly the evidence was different.* 22 T. C. No. 43
The Fourth Circuit, relying on *Sunnen* v. *Commissioner, supra,* holds collateral estoppel *applicable* and *affirms.* 222 F. 2d 622 (Appendix to Petition, pp. 23 *et seq.*)	The Fifth Circuit, relying on *Sunnen* v. *Commissioner, supra,* holds collateral estoppel *inapplicable* and *reverses.* 224 F. 2d 788, 792-3

II.

Subsequent to the filing of the Petition for Certiorari herein and subsequent to the order of this Court of October 10, 1955, denying certiorari herein, the Delaware Chancery Court, on October 19, 1955, decided *Schleiff* v. *Baltimore & Ohio R. R. Co.* Therein, the Chancellor of the State of Delaware holds (contrary to the decision of

the Court of Appeals for the Fourth Circuit below) that common law equitable doctrines do not apply as a non-statutory amendment to the Acts of Congress. The case is not yet officially reported and the only available reference is 24 Law Week 2180-1. Therein the Chancellor stated:

> "While the doctrine of pari delicto is a vital principle in equity, nevertheless, this court feels compelled to follow the rationale of the U. S. Supreme Court cases requiring the carrier to recover undercharges even though the carrier was guilty of conduct otherwise calling for the application of the pari delicto doctrine. The defenses of pari delicto, *estoppel,* unclean hands, etc., *are just not recognized* in these cases because to do so would be to override the public policy reflected in the Interstate Commerce Act. See Kan. City So. Ry. *v.* Cool, 227 U. S. 639; Baldwin *v.* Scott Milling, 307 U. S. 478; See also McFadden *v.* Ala. Great So. Co., 241 Fed. 562." [Italics ours.]

Conclusion.

The petition for rehearing should be granted, the denial of certiorari vacated and the petition for certiorari granted.

Respectfully submitted,

Earl Q. Kullman,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the ground specified under Rule 58 of the Rules of this Court.

EARL Q. KULLMAN,
Counsel for Petitioner.